

1 confusing "substantive" and "procedural" due process in this case. See e.g., Motion  
2 to Dismiss, pg. 6, lines 13 & 14 [i.e., "If such and interest is found, then a court must  
3 consider whether constitutionally sufficient procedures were used."]. To be clear,  
4 Plaintiff's claim in this case is for "substantive" due process.

5 The United States Supreme Court has made it clear that "[t]he  
6 touchstone of due process is protection of the individual against arbitrary action of  
7 government." See Daniels v. Williams, 474 U.S. 327, 331 (1986); see also Logan v.  
8 Zimmerman Brush Co., 455 U.S. 422 (1981) (a federal interest remains in "protecting  
9 the individual citizen from state action that is wholly arbitrary or irrational.").

10 In the present case, Plaintiff has alleged specific facts to support  
11 her claim that the conducts of Defendant Atalig in withholding her requisition that  
12 would have resulted in Plaintiff finally receiving her land compensation claim were  
13 wholly arbitrary and irrational. The foregoing is particularly so in light of said  
14 Defendant Atalig having allowed the release of other requisitions that resulted in  
15 similarly situated wetland owners getting compensated as required by law to the  
16 exclusion of Plaintiff.

17 Defendant Atalig appears to anchor or justify his actions based on  
18 the actions of the CNMI Office of the Attorney General and Defendant Brown.  
19 However, as made blatantly clear in Plaintiff's complaint and in this opposition, the  
20 actions and conducts of the CNMI Office of the Attorney General and Defendant  
21 Brown are in and off-themselves wholly arbitrary and irrational as well. Thus,  
22 Defendant Atalig cannot rely on the same in trying to argue otherwise. Two "wrongs"  
23 do not make a "right."

24  
25 **4. Plaintiff has not Shown Violation of Her Right to Equal Protection:**

26 Plaintiff is at lose as to how is it possible that Defendant Atalig  
27 makes the foregoing argument knowing full well the undisputed facts of this case vis  
28 a vis his role in allowing similarly situated wetland owners as that of Plaintiff to be

1 compensated and, at the same time, denying Plaintiff the same privilege and  
2 protection. Given these facts, would a reasonable person in Defendant Atalig's shoes  
3 have done what he did in this case to Plaintiff? Additionally, would a reasonable  
4 person allowed another similarly situated wetland owner to be compensated knowing  
5 fully well that the Office of the Attorney General and Defendants CNMI/Brown were  
6 in the Superior Court questioning the legality of Plaintiff's wetland compensation under  
7 CNMI P.L. 13-17, as amended by CNMI P.L. 14-29. The simple answer to the  
8 foregoing questions is "no."

9           It is undisputed that Plaintiff is a part of a class of people who  
10 were intended by CNMI P.L. 13-17, as amended by CNMI P.L. 14-29, to be  
11 compensated for the taking of their properties. Further, it is also undisputed that  
12 within this class of "land claim beneficiaries," Plaintiff is a member of a limited class  
13 of landowners who owned wetlands taken by Defendant CNMI. To state a § 1983  
14 claim for violation of the Equal Protection Clause, "a plaintiff must show that the  
15 defendants acted with an intent or purpose to discriminate against the plaintiff based  
16 upon membership in a protected class." See Lee v. City of Los Angeles, 250 F.3d  
17 668, 686 (9<sup>th</sup> Cir. 2001); see also Freeman v. City of Santa Anna, 68 F.3d 1180,  
18 1187 (9<sup>th</sup> Cir. 1995) ("The first step in equal protection analysis is to identify the  
19 classification of groups."). Given that Plaintiff has show beyond any doubt that she  
20 was a member of an identifiable class of persons entitled to be compensated for the  
21 taking of their wetland properties but that she was treated differently then the other  
22 class members similarly situated, she has met her burden in this case. Additionally,  
23 she has met her burden of showing by her allegations that Defendant Atalig's  
24 discriminatory treatment towards her had no rational basis. See SeaRiver Mar. Fin.  
25 Holding, Inc. v. Mineta, 309 F.3d 662 (9<sup>th</sup> Cir. 2002).

26           In his motion to dismiss, Defendant Atalig makes the argument that  
27 Plaintiff has failed to allege facts to overcome the presumption of rationality that  
28 applies to government classification. See Motion to Dismiss, pg. 7, lines 13

1 through 18. To the contrary, Plaintiff has alleged specific facts in her complaint to over  
2 such a presumption. It is Defendant Atalig who has failed in his motion to present any  
3 evidence to this Honorable Court to show that there existed a rationale basis for him  
4 and others to discriminate against Plaintiff. The burden is on Defendant Atalig to put  
5 forth evidence of rationality, not Plaintiff.

6 In all, Plaintiff has stated a claim in this case against Defendant Atalig for  
7 violation of her right to equal protection of laws under both the U.S. and the CNMI  
8 constitutions.

9  
10 **II. Plaintiff's Second Cause of Action Must be Dismissed as no Conspiracy**  
11 **has been Proved:**

12 Count II accuses Defendant Atalig of conspiracy pursuant to § 1985(3).  
13 In her complaint and as discussed above, Plaintiff alleges that she was a part of a  
14 class of persons entitled to be compensated under the Federal and the CNMI  
15 constitutions, as well as CNMI P.L. 13-17, as amended by CNMI P.L. 14-29. See  
16 Plaintiff's Complaint, ¶ 51. Further, in her complaint, Plaintiff further alleged the  
17 conspiratorial purpose and the various over acts committed against her in which  
18 Defendant Atalig was a part of. See Plaintiff's Complaint, ¶¶ 48 & 49. The  
19 undisputed facts of this case fully supports the foregoing allegations, facts that came  
20 about because of the actions and conducts of Defendant Atalig and others.

21 Now, on the question of what motivated Defendant Atalig and Defendant  
22 Brown, principally, to have done what they did in this case to Plaintiff's, the same  
23 remains to be seen. At minimum, however, Plaintiff has alleged conspiracy under §  
24 1983. See Juyel Ashmed et al. v. Robert Goldberg, Civil Action Nos. 00-0005 & 99-  
25 0046 (consolidated), Order Granting In Part and Denying In Part Defendant Goldberg's  
26 Motion to Dismiss (NMI Dist. Ct. Nov. 14, 2000); citing Askew v. Miller, 191 F.3d  
27 953, 957 (8<sup>th</sup> Cir. 1999) (To establish a conspiracy under § 1983, plaintiff must show  
28 "the defendant conspired with others to deprive him or her of a constitutional right;

1 that at least one of the co-conspirators engaged in an overt act in furtherance of the  
2 conspiracy; and that the overt act injured plaintiff.”).<sup>11</sup>

3  
4 **III. All of Plaintiff’s Commonwealth Law Claim Against Secretary Atalig Must  
be Dismissed:**

5 **A. Secretary Atalig is Protected by Sovereign Immunity in his Official  
6 Capacity:**

7 Defendant Atalig is not the CNMI government and, therefore,  
8 sovereign immunity does not apply to him in his personal capacity. In fact, Defendant  
9 Atalig admits the foregoing when, in his motion to dismiss, he notes that  
10 “[s]pecifically, the government cannot be liable for any claim based upon an act or  
11 omission . . . based upon the exercise or performance . . . [of] a discretionary function  
12 . . . whether or not the discretion is abused.” See Motion to Dismiss, pg. 8, line 24,  
13 and pg. 9, lines 1 & 2; citing 7 CMC § 2204(a); see also He, Guo Quiong v. CNMI, et  
14 al., Civil Action No. 99-268B, Order Denying Defendants’ Motion to Dismiss (CNMI  
15 Superior Court, Oct. 25<sup>th</sup>, 2000).

16 Plaintiff, having stated the above, would argue to this Honorable  
17 Court that, to the extent that sovereign immunity is an issue in this case vis a vis  
18 Defendant Atalig in his official capacity with respect to the tort claims against him,  
19 then the same has been waived pursuant to 7 CMC § 2202(a). In other words, in his  
20 official capacity, Defendant Atalig can be held liable up to \$100,000.00 on all of  
21 Plaintiff’s tort claims against him. Id. Given that Defendant Atalig was fully aware  
22 of the disbursement agreement in this case and chose to violate the same by his  
23 conduct, he can be found liable in this case. See Plaintiff’s Complaint, ¶ 21, Exhibit  
24 “C.” By said disbursement agreement, any discretion that Defendant Atalig had was  
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26 <sup>11</sup> See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (in  
27 order to satisfy color of state law requirement under civil conspiracy theory, plaintiff  
28 need only have shown that there was an understanding between civilian and officers  
to deprive plaintiff of her rights).

1 confined to issues relative to whether or not Plaintiff in this case owed money to the  
 2 CNMI government. As it turned out, Plaintiff did owe money for her medical bills as  
 3 a kidney dialysis patient at the Commonwealth Health Center ["CHC"] and, therefore,  
 4 a lawsuit was filed against her to collect the same by Defendant CNMI. See Plaintiff's  
 5 Complaint, ¶ 24, Exhibit "F." This lawsuit was eventually settled and, as such, there  
 6 existed no reason, legal or otherwise, for Defendant Atalig to further withhold the  
 7 release of Plaintiff's requisition in this case.

8  
 9 **B. Secretary Atalig is Protected by Absolute Immunity in his Personal Capacity:**

10 Defendant Atalig, in this argument, admits that "[a]ll of the  
 11 Commonwealth law claims asserted against Secretary Atalig in his personal capacity  
 12 are tort law claims." See Motion to Dismiss, pg. 9, lines 14 & 15.<sup>12</sup> Defendant Atalig,  
 13 relying on § 895D(3) & (3)(a) of Restatement (Second) of Torts, argues to this  
 14 Honorable Court that he is somehow entitled to absolute immunity in this case in his  
 15 personal capacity. See Motion to Dismiss, pg. 9, lines 15 through 22. Other than  
 16 mentioning that Defendant Atalig was performing a "discretionary function," said  
 17 Defendant fails utterly to put anything more to support his claim of absolute  
 18 immunity. In fact, a careful review of § 895D as a whole and the comments  
 19 thereafter clearly shows that Defendant Atalig is not entitled to absolute immunity.

20 Section 895D(3)(a) states that "[a] public official acting within the  
 21 general scope of his authority is not subject to tort liability for an administrative act  
 22 or omission if (a) he is immune because engaged in the exercise of a discretionary  
 23 function[.]" See Restatement (Second) of Torts, § 895D(3)(a). Comment g (Scope  
 24 of official authority) states, in relevant parts, the following:

25  
 26  
 27 <sup>12</sup> This admission is highly relevant in light of Defendant Atalig's argument that he  
 28 is entitled to sovereign immunity. As previously discuss, given 7 CMC § 2202(a), Defendant  
 Atalig may be held liable to Plaintiff in this case to the tune of \$100,000.00 for each of the  
 tort claims by Plaintiff against him.

1            "An immunity protects an officer only to the extent that he  
 2            is acting in the general scope of his official authority. When  
 3            he goes entirely beyond it and does an act that is not  
 4            permitted at all by that duty, he is not acting in his capacity  
              as a public officer or employee and he has no more  
              immunity than a private citizen."

5            See Restatement (Second) of Torts, § 895D(3)(a), Comment g. The comments goes  
 6            on to further state that "[t]he scope of an officer's liability in tort may be broadened  
 7            or restricted by legislative action." See Restatement (Second) of Torts, § 895D(3)(a),  
 8            Comment i (Legislative modifications). In fact, as an example, 42 U.S.C. § 1983  
 9            (1970) is cited. Id. Given the undisputed facts of this case that Defendant Atalig  
 10           clearly acted outside the scope of his official authority and given further that § 1983  
 11           renders said Defendant's § 895D(3)(a) argument baseless, it is necessary now to turn  
 12           to case laws on this issue.

13           Although state officials are entitled to some degree of immunity  
 14           from § 1983 damages actions arising from their official acts, "[t]he presumption is  
 15           that qualified rather than absolute immunity is sufficient to protect government  
 16           officials in the exercise of their duties." See Burns v. Reed, 500 U.S. 478, 486-87  
 17           (1991). "[A]n official derives the appropriate degree of immunity not from his or her  
 18           administrative designation but by the function he or she performs." See Anderson v.  
 19           Boyd, 714 F.2d 906, 908 (9<sup>th</sup> Cir. 1983); see also Kalina v. Fletcher, 522 U.S. 118,  
 20           127 (quoting Forrester v. White, 484 U.S. 219, 229 (1988) (courts looks at "the  
 21           nature of the function performed, not the identity of the actor who performed it.")).  
 22           In line with the foregoing is the legal requirement that the official seeking absolute  
 23           immunity bears the burden of demonstrating that absolute immunity is justified for the  
 24           function in question. See Buckely v. Fitzsimmons, 509 U.S. 259, 269 (1993); see  
 25           also Burns, 500 U.S. at 486-87.<sup>13</sup>

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26           <sup>13</sup>           It is submitted that Defendant Atalig is neither a prosecutor, a judge, much less  
 27           a public official performing any function intimately associated with the judicial process. The  
 28           function he was legally required to perform in this case was an administrative one vis a vis  
              concur with Plaintiff's requisition after ensuring that Defendant CNMI is paid for what Plaintiff

1 As mentioned above, other than stating that Defendant Atalig  
 2 performed discretionary function, said Defendant does not put forth anything more to  
 3 support his claim for absolute immunity. The reason being, none exist. As a matter  
 4 of law, said Defendant is not entitled to the same. At minimum, he is entitled to  
 5 assert qualified immunity for his actions and conducts in this case. But, again, as  
 6 already discussed herein, said Defendant Atalig is not even entitled to qualified  
 7 immunity given the facts of this case and the laws.

8 In all, Defendant Atalig reliance on Restatement (Second) of Torts  
 9 § 895D(3) & (3)(a) cannot save the day for him because the same cannot be used to  
 10 thwart § 1983 remedies available to Plaintiff in this case. See e.g., Howlett v. Rose,  
 11 496 U.S. 356, 376-77 (1990) & Felder v. Casey, 487 U.S. 131, 139 (1988) (“[W]e  
 12 have held that a state law that immunizes government conduct otherwise subject to  
 13 suit under § 1983 is preempted . . . because the application of the state law would  
 14 thwart the congressional remedy . . . which of course already provides certain  
 15 immunities for state officials.”). This is also the rule laid-out by the Ninth Circuit. See  
 16 e.g., Sosa v. Hiraoka, 920 F.2d 1451, 1460 n. 3 (9<sup>th</sup> Cir. 1990) (noting that the  
 17 Supreme Court has “held that state law immunities have no force against § 1983 suits  
 18 where the state law immunity purports to provide immunity ‘over and above those  
 19 already provided in § 1983’[.]”).<sup>14</sup>

20  
 21 **IV. Plaintiff’s Claim of Common law Conspiracy Must be Dismissed as this**  
 22 **Cause of Action is not Recognized in the Commonwealth:**

23 Plaintiff, in the interest of judicial economy, would respectfully ask that  
 24 this Honorable Court to refer to her arguments above-state in Part II of the foregoing

25 \_\_\_\_\_  
 26 owed for her medical bills as a kidney dialysis patient at CHC.

27 <sup>14</sup> Pursuant to 7 CMC § 3401, Defendant Atalig relies on Restatement (Second)  
 28 of Torts § 895D(3) & (3)(a). Accordingly and for purposes of the immunity discussion herein,  
 said § 895D(3) & (3)(a) is a CNMI law, i.e., a state law.



1 opposition. As state therein, at minimum, Plaintiff has alleged conspiracy under §  
 2 1983. See Juyel Ashmed et al. v. Robert Goldberg, Civil Action Nos. 00-0005 & 99-  
 3 0046 (consolidated), Order Granting In Part and Denying In Part Defendant Goldberg's  
 4 Motion to Dismiss (NMI Dist. Ct. Nov. 14, 2000); citing Askew v. Millerd, 191 F.3d  
 5 953, 957 (8<sup>th</sup> Cir. 1999) (To establish a conspiracy under § 1983, plaintiff must show  
 6 "the defendant conspired with others to deprive him or her of a constitutional right;  
 7 that at least one of the co-conspirators engaged in an overt act in furtherance of the  
 8 conspiracy; and that the overt act injured plaintiff."); see also Adickes v. S.H. Kress  
 9 & Co., 398 U.S. 144, 152 (1970) (in order to satisfy color of state law requirement  
 10 under civil conspiracy theory, plaintiff need only have shown that there was an  
 11 understanding between civilian and officers to deprive plaintiff of her rights). So,  
 12 while civil conspiracy may not be recognized in the Commonwealth, it is recognized  
 13 under the federal system and by § 1983.

14  
 15 **V. Plaintiff's Claims for Intentional Interference with a Contract and with**  
 16 **Economic Relations Must be Dismissed:**

17 Defendant Atalig argues that Plaintiff's claim for intentional interference  
 18 with her settlement agreement with MPLA (Count VII) and with her economic  
 19 relationship with MPLA (Count VIII) are fatally flawed. See Motion to Dismiss, pg. 10,  
 20 lines 14 through 19. The reasons put forth by said Defendant are his unfounded  
 21 claims of sovereign immunity and also [disturbingly] his assertion that Plaintiff failed  
 22 to allege improper interference. For the following reasons, the foregoing argument  
 23 must fail.

24  
 25 **A. Secretary Atalig in his Official Capacity is Protected by Sovereign**  
 26 **Immunity:**

27 Again, respectfully, Plaintiff would ask this Honorable Court to  
 28 refer to her arguments herein with respect to this issue of sovereign immunity as set  
 forth in Part III(A) above. Based on said arguments, it is clear that Defendant Atalig



1 is not entitled to sovereign immunity pursuant to 7 CMC § 2202(a), at least to the  
2 tune of \$100,000.00 for each tort claim being made by Plaintiff against him in this  
3 case.

4  
5 **B. These Claims Against Secretary Atalig in his Personal Capacity  
6 Must be Dismissed for Failure to Allege Improper Interference.**

7 Defendant Atalig, aside from asserting that Plaintiff's claims herein  
8 are not properly pled, also asserts again the issue of absolute immunity. Again, for  
9 reasons of judicial economy, Plaintiff would again respectfully ask that this Honorable  
10 Court refer to her arguments on the issue of absolute immunity as set forth in Part IIIB  
11 above.

12 Now, turning to the argument that Plaintiff did not properly plea  
13 her claims herein, Plaintiff would respectfully brings to the attention of this Honorable  
14 Court ¶¶ 78 (Count VII) and 83 (Count VIII) of her complaint. Therein, it is specifically  
15 stated that Defendant Atalig's interference was not only "improper" but were also  
16 "illegal." It is also worth noting that the actions of Defendants Brown as well as CDA,  
17 Ada, and BOG are all attributable to Defendant Atalig as a co-conspirator in this case.  
18 By her allegations in her complaint, Plaintiff has put Defendant Atalig on notice as to  
19 the "impropriety" and the "illegality" of his actions and conducts in this case towards  
20 Plaintiff. For Defendant Atalig to argue otherwise is disturbing in light of the specific  
21 allegations by Plaintiff in her complaint against him.

22 **VI. Plaintiff's Claim for Intentional and Negligent Infliction of Emotional  
23 Distress Must be Dismissed:**

24 **A. The Negligent Infliction of Emotional Distress Claim must be  
25 Dismissed Because Plaintiff Fails to Allege Bodily Harm and  
26 Because Secretary Atalig Behavior was Reasonable:**

27 Defendant Atalig, citing Restatement (Second) of Torts § 313(1)(a)  
28 & (b), argues that this claim by Plaintiff is defective as it fails to allege that Plaintiff  
suffered any actual illness or bodily harm. See Motion to Dismiss, pg. 12, lines 4

1 through 10.

2 In her complaint, Plaintiff alleged that "[a]s a direct and proximate  
3 cause of the negligent conducts and actions of said Defendants [which includes  
4 Defendant Atalig], Plaintiff has suffered and will continue to suffer emotional distress  
5 such as severe, continuous headaches, pain, anguish, emotional trauma,  
6 embarrassment, and humiliation." See Plaintiff' Complaint, ¶ 98. In light of the  
7 specific facts alleged by Plaintiff in her complaint, to wit: Defendant Atalig allowing  
8 other similarly situated wetland owners to be compensated but not Plaintiff, Defendant  
9 Atalig continuing to deny Plaintiff her property, Plaintiff being a kidney-dialysis patient  
10 awaiting a kidney transplant to save her life, Plaintiff being on a waiting-list for a  
11 kidney transplant which requires substantial financial need, Plaintiff's debt to CHC,  
12 Plaintiff being sued in the CNMI Superior Court, and Defendant Atalig again allowing  
13 another similarly situated wetland owner to be compensated while Plaintiff is before  
14 the CNMI Superior Court fight for her right to her property, to list a few, can it be said  
15 that Plaintiff [at trial] will not be able to prove that Defendant Atalig's conducts and  
16 actions caused her bodily harm. That is, does "it appear beyond doubt that plaintiff  
17 can prove no set of facts in support of [her] claim which would entitled [her] to  
18 relief[?]" See Parks Sch. Of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9<sup>th</sup> Cir.  
19 1995). There is no question that, based on the facts of this case, Plaintiff at trial will  
20 be able to prove that Defendant Atalig caused her severe and continuous headaches,  
21 pain, anguish, and emotional trauma.

22 Defendant Atalig further argues that Plaintiff does not allege that  
23 his conduct was unreasonable. See Motion to Dismiss, pg. 12, lines 11 through 13.  
24 In response to the foregoing argument, Plaintiff would simply say that the facts of this  
25 case relative to Defendant Atalig's conducts and actions, as specifically alleged by  
26 Plaintiff in her complaint, say otherwise. For said Defendant to argue that what he did  
27 to Plaintiff in this case is not unreasonable only further prove and support all of  
28 Plaintiff's claims against him in this case in that it shows just how ill-will Defendant

1 Atalig was against Plaintiff.

2  
3 **B. The Intentional Infliction of Emotional Distress Claim must be**  
4 **Dismissed Because Secretary Atalig's Conduct was not Extreme**  
5 **and Outrageous:**

6 Defendant Atalig argues that his conducts and actions in this case  
7 were not extreme and outrageous. In other words, what he did was exercise his  
8 discretion to delay his concurrence in a requisition that was of dubious legality. See  
9 Motion to Dismiss, pg. 13, lines 9 & 10. Again, the only things "dubious" in this case  
10 are the actions and conducts of all the Defendants being sued herein and that of the  
11 CNMI Office of the Attorney General.

12 The undisputed facts of this case speak for themselves. Defendant  
13 Atalig cannot attempt to hide from these facts by only arguing about his own illegal  
14 conduct and actions. Aside from having to atone to his own conducts and actions in  
15 this case towards Plaintiff, Defendant Atalig must also atone to having consented and  
16 agreed to join in on the illegal conducts and actions of the other co-conspirators  
17 specifically named in this case. The fact of the matter is that Plaintiff has alleged  
18 specific facts against Defendant Atalig that should and must not be accepted or  
19 tolerated in a civilized society. One does not enter into a settlement agreement as a  
20 result of a court action only to turn around and, by a lawsuit, claim that the subject-  
21 matter of the same settlement agreement is void as a matter of law in a futile attempt  
22 to deny one's right to her property pursuant to laws and by a settlement agreement.  
23 One does not withhold a person's property, under color of law, without any legal basis  
24 only to turn around and allow other similarly situated wetland owners to be fully  
25 compensated all the while still refusing the same privilege and right to the same person  
26 whose property is being withheld. In other words, one must not abuse his official  
27 position at the expense of another person in a civilized society. Defendant Atalig is  
28 guilty in all respect in this case for having done what he did to Plaintiff and for having  
consented and agreed with others to further harm Plaintiff in this case.

1 Plaintiff will, at trial, be able to prove just out outrageous and extreme  
2 Defendant Atalig's conduct in this were towards Plaintiff. And, as a result of the  
3 same, Plaintiff suffered. See Parks Sch. Of Business, Inc. v. Symington, 51 F.3d  
4 1480, 1484 (9<sup>th</sup> Cir. 1995).

5  
6 CONCLUSION:

7 For all the foregoing reasons herein stated, Plaintiff respectfully ask that this  
8 Honorable Court denies the motion to dismiss in this case by Defendant Atalig.

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10 Dated this the 10<sup>th</sup> day of January, 2006.

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12 Respectfully Submitted:

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16 Brien Sers Nicholas, Esq.  
17 Attorney for Plaintiff  
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